85-1859

Supreme Court, U.S.
FILED
APR 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARTIN A. LUNDGARD, Appellant

v.

STATE OF OHIO, Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

DIANE M. KAPPELER
Suite 518
111 West First St.
Dayton, OH 45402
(513) 223-0966
Counsel for Appellant

April 28, 1986.

QUESTIONS PRESENTED

1) Whether Section 2907.05 (A)(3) and (B) of the Ohio Revised Code violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when applied to impose a greater (felony) penalty upon a defendant whose conduct violates both §2907.05 (A)(3), a felony, and §2907.06 (A)(4), a misdemeanor, where the statutes are contradictory in substance and thus in conflict.

2) Whether a trial court violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it accepts a tendered plea of no contest where the defendant, in addressing the court immediately after his plea, unequivocally denies an element of the offense charged.

3) Whether a court violates the Due Process Clause of the Fourteenth Amend-

ment when, after a first revocation proceeding is concluded with the court's decision to continue the probationer on probation with additional conditions, the court later, in a second revocation proceeding, revokes his probation based upon violations which were found and fully disposed of in the first revocation proceeding.

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JURISDICTIONAL STATEMENT

Martin A. Lundgard, the appellant, appeals from the final judgment entry of the Supreme Court of Ohio, dated January 29, 1986, dismissing his appeal from the Court of Appeals for Miami County which held: 1) §2907.05(A)(3) and (B) of the Ohio Revised Code , as applied in this case, are not unconstitutional as being violative of appellant's right to Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution; 2) the trial court did not violate appellant's right to Due Process when it accepted his tendered plea of no contest; and, 3) the court did not violate appellant's right to Due Process in its conduct of his (second) probation revocation hearing nor in its finding and its decision to revoke appellant's probation.

OPINIONS BELOW

The entry of the Supreme Court of Ohio, which appears in the appendix hereto, p.3a, is unreported as of this writing.

The opinion and the journal entry of the Court of Appeals of Miami County, dated September 26, 1985 also appear in the appendix hereto, p.p. 5a and 22a, and are unreported as of this writing.

JURISDICTION

The judgment of the Supreme Court of Ohio dismissing appllant's appeal (from the judgment of the Court of Appeals for Miami County) was entered on January 29, 1986.

A Notice of Appeal to this Court was timely filed in the Supreme Court of Ohio on April 29, 1986.

This appeal is being docketed in this

Court within 90 days after the entry of the judgment appealed from. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2). Appellant also asks that in finding that it has jurisdiction under 28 U.S.C. §1257 (2), this Court will also take jurisdiction over any aspects of this case which would otherwise fall solely within this Court's certiorari jurisdiction. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029 (1975).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Section 1, United States Constitution:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES AND RULES

Ohio Revised Code §2907.01:

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A)"Sexual conduct" means vaginal intercourse between a male and female...

(B)"**Sexual contact**" means any touching of an erogenous zone of another...for the purpose of sexually arousing or gratifying either person.

Ohio Revised Code §2907.05:

(A)No person shall have sexual contact with another, not the spouse of the offender...when...

(3)The other person,...is less than thirteen years of age, whether or not the offender knows the age of such person.

(B)Whoever violates this section is guilty of **gross sexual imposition**... a felony of the third degree.

Ohio Revised Code §2907.06:

(A)No person shall have sexual contact with another, not the spouse of the offender...when...

(4)The other person,...is over twelve but not over fifteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

...

(C)Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree.

Ohio Rules of Criminal Procedure:

Rule 11. Pleas, Rights Upon Plea

(C) (2) In felony cases the court may refuse to accept a plea of guilty or of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

Ohio Revised Code §2951.09:

When a defendant on probation is brought before the judge...such judge shall immediately inquire into the conduct of the defendant, and may terminate the probation and impose any sentence which might originally have been imposed or continue the probation and remand the defendant to the custody of the probation authority, at any time during the probationary period. When the ends of justice will be served and the good conduct of the person so held warrants it, the judge or magistrate may terminate the period of probation....

HOW THE FEDERAL QUESTION WAS RAISED

Appellant's trial counsel began his opening statement to the trial court by calling that court's attention to the confusion and contradiction which exists between Ohio Revised Code §2907.05(A)(3) and §2907.06(A)(4). Trial Transcript pp. 1-3. The issue was raised again in appellant's fourth assignment of error to the Court of Appeals for Miami County: in appellant's brief (filed therein 12/24/84), in his supplement to his reply brief (filed therein 6/27/85), in his application for reconsideration (filed therein 10/8/85), and in his motion and supplement to certify the conflict (filed therein 11/11 and 29/85). The equal protection claim was reiterated by appellant in his memo. in support of jurisdiction filed in the Supreme Court of Ohio in December of 1985.

The issues presented to this Court in

in questions 2 and 3 were raised in appellant's briefs to the Court of Appeals for Miami County and in his memo. in support of jurisdiction filed in the Supreme Court of Ohio.

The Ohio Supreme Court dismissed appellant's appeal. It thus considered and upheld the Court of Appeals' rejection of appellant's federal constitutional claims.

STATEMENT OF THE CASE

Appellant was indicted for one count of gross sexual imposition in violation of Ohio Revised Code §2907.05(A)(3), in the Common Pleas Court of Miami County, Ohio on October 8, 1981. The other person was a female, age 12 years and two months. Appellant pled not guilty and the case proceeded to trial. Appellant's trial counsel began his opening statement

by calling the trial court's attention the confusion and contraciction which exists between Ohio Revised Code §§2907.05(A)(3) and 2907.06(A)(4). On December 28, the State presented its case and rested; Appellant moved for a directed verdict of acquittal which was denied. On December 29, Appellant withdrew his plea of not guilty and tendered a plea of no contest to the charge. The trial court made a finding of guilty and then permitted appellant to make a statement. He stated, in part:

> Both in my heart and in my mind I, myself, know that I'm not guilty.... I did love her. I realized that at her stage of development, however, that a sexual act or play would harm her not only physically but emotionally as well. And my feelings are that you just do not hurt people you love, at least not intentionally. If as the witnesses have stated that I did touch her in some manner not considered normal by their standards, that touching was not done intentionally or for sexual gratification.... I'm Morman, Your Honor, and my faith

> has strict admonitions against pre-marital and extra-marital sex. And so no matter what my feelings were emotionally toward the girl, my personal religious beliefs as well would not permit me to commit a sexual act or offense against her or any other woman outside of marriage. ...if I'm guilty of anything, it's not a sexual act but a very bad error in judgment.

On March 4, 1982, the trial court sentenced Appellant to a term of three to ten years in the Ohio State Penitentiary, suspended the execution of sentence, and placed Appellant on probation with several special conditions.

In July of 1982, Appellant received written notice that he was alleged to have committed three violations of probation: changing residence, failing to report to the probation officer, and failure to continue alcoholism treatment.

After his a hearing, the court filed its July 27th Entry Continuing and Modifying (appellant's) Probation, appendix p.31a

Approximately seven months later, Appellant was once again taken before the trial court. He had received no written notice of any violations of probation in that seven month interum. The trial court then--after a (second) hearing on February 25, 1983, during which it stated that the "sole issue" was whether defendant completed the program at Hazelton (Transcript p. 10)--revoked Appellant's probation for his omissions which occurred before the (first) July 21, 1982 hearing and for failure to complete the additional condition which was imposed upon him on July 27, 1982. The original sentence of three to ten years was imposed. The Court of Appeals for Miami County affirmed the Conviction and sentence on September 26, 1985.

The Ohio Supreme Court dismissed Appellant's appeal on January 29, 1986.

THE QUESTIONS ARE SUBSTANTIAL

The question raised here concerning the Appellant's no contest plea, which was immediately followed by his unequivocal denials of an essential element of the offense charged, is a substantial one. In a decision involving U.S. District Court Criminal Rule 11, which is quite similar to Ohio Criminal Rule 11, this Court held that it was reversible error to accept a plea in violation of the requirement that the court personally address the defendant, inform him of, and determine that he understands the nature of the charge to which the plea is offered. McCarthy v. United States, 394 U.S. 459 (1969). The trial court here did not read the indictment to Defendant-Appellant nor did it explain the charge to him. His denials were not addressed at all by the trial court. Thus, even after being alerted to the Appellant's

lack of understanding of the charge which a no contest plea supposedly admitted, the trial court ignored his statement and thereby compounded its error to the prejudice of Appellant.

Even if Appellant's no contest plea had been valid, the trial court's imposition of a sentence for a felony where two Ohio statutes prohibit identical avtivity and require identical proof, yet impose different penalties (felony v. misdemeanor) should be overturned as an unconstitutional violation of the Equal Protection Clause. Cleveland v. Huff, 14 Ohio App. 3d 207 (1984). The ambiguity which exists when the "other person" is over age 12 yet under age 13 (recall here, she was age 12 years and two months) in Ohio Revised Code §§2907.05 and 2907.06 must be resolved.

Lastly, procedures which must be

followed in light of the due process requirements to be met in all probation revocation proceedings must be set forth. This Court's landmark cases of Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) detailed the minimum due process requirements to be met in such proceedings. Here, those basis rights have been denied and Appellant prays for justice. After three years of unjust imprisonment, and facing the possibility of seven more years, Appellant prays that this Court will consider his pleas, pursue a further investigation of these substantial constitutional questions and uphold his rights which have for so long been violated.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DIANE M. KAPPELER
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111 West First Street
Dayton, Ohio 45402-1131
(513) 223-0966
Counsel for Appellant

April 28, 1986

APPENDIX

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September 26, 1985 Opinion of the Court of Appeals of Miami County, Ohio.....5a

September 26, 1985 Journal Entry of the Court of Appeals of Miami County, Ohio.....22a

January 31, 1985 Decision and Entry of the Court of Appeals of Miami County granting leave to appeal.....24a

March 8, 1983 Decision-Journal Entry of the Common Pleas Court of Miami County revoking probation and imposing the original sentence.27a

July 27, 1982 Entry Continuing and Modifying Probation of the Common Pleas Court of Miami County.....31a

March 11, 1982 Entry: Sentence--Suspension Thereof and Granting Probation.....34a

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that (1)a complete copy of this Jurisdictional Statement was sent to the Miami County Prosecutor, as Counsel for Appellee, at the Safety Building, 201 West Main St., Troy, Ohio 45373 by personal service on April 28, 1986 and (2)three complete re-bound copies of this Jurisdictional Statement were sent to the same said Counsel for Appellee at the same address by regular mail on May 10,1986.

Diane M. Kappeler

Diane M. Kappeler
Counsel for Appellant

APPENDIX

In the Supreme Court of the

State of Ohio

MARTIN A. LUNDGARD, Appellant,	)	CASE
	)	No.
v.	)	85-1822
	)	
STATE OF OHIO, Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Martin A. Lundgard, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment entry of the Supreme Court of the State of Ohio, dismissing his appeal from the Court of Appeals for Miami County, entered herein on January 29, 1986.

This appeal is taken pursuant to 28 U.S.C. §1256 (2).

Diane M. Kappeler
Counsel for Appellant
Suite 518
111 West First Street
Dayton, Oh. 45402-1131
(513) 223-0966

Proof of Service

I, the undersigned, do hereby certify that a copy of the Notice was sent to the Miami County Prosecutor, as Counsel for Appellee at the Safety Building, Troy, Ohio 45373 by express mail on this 28th day of April, 1986.

Diane M. Kappeler

Diane M. Kappeler

THE SUPREME COURT OF OHIO

Columbus

1986 TERM

State of Ohio, Appellee,	:	To wit: January 29, 1986
v.	:	Case No. 85-1822
Martin A. Lundgard, Appellant.	:	E N T R Y

Upon consideration of the motion for leave to appeal from the Court of Appeals for Miami County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Diane M. Kappeler.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

James WM. KELLY CLERK

_____ DEPUTY

IN THE COURT OF APPEALS OF
MIAMI COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs. : Case No. 84-CA-67

MARTIN A. LUNDGARD :

Defendant-Appellant :

.....

O P I N I O N

Rendered on the 26th day of September, 1985.

JEFFEREY M. WELBAUM, Prosecuting Attorney, BY: Christopher Gee, Assistant Prosecuting Attorney, Miami County Prosecutor's Office, Safety Building, Troy, Ohio 45373
Attorney for Plaintiff-Appellee

DIANE M. KAPPELER, 111 West First Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....

PER CURIAM:

On October 8, 1981, the defendant, Martin Lundgard, was indicted for gross sexual imposition in violation of

Section 2907.05(A)(3), Revised Code. Subsequently, the cause came on for hearing without the intervention of of a jury, but after the prosecution had rested and following the denial of a defense motion for acquittal, Lundgard entered a plea of no contest to the charge against him. He was found guilty, given a suspended sentence of three to ten years, and placed on probation for a period of five years.

On July 21, 1982, Lundgard appeared with counsel at a probation revocation hearing pursuant to notice, and at the hearing, he admitted the violations alleged by his probation officer. Based upon the finding of the trial court that the defendant had

violated the terms and conditions of his probation, he was committed to the Miami County Jail for a period of six months, but the commitment was tempered by the following stipulation:

> "That if defendant applied to, and is accepted by, the Hazelden, Minnesota Alcoholism Treatment Center, and that if defendant agrees to pay all cost of treatment and transportation, that defendant is to be released to the Hazelden Alcoholism Center until completion of treatment. He is then to be returned to the Miami County Jail for consideration by the court for release or further consideration."

Another probation violation hearing was conducted by the Common Pleas Court on February 28, 1983, after which the trial court ruled as follows:

State vs. Lundgard

"A probation violation hearing was held by this court on February 28, 1983 with the defendant present and represented by counsel, Mr. Richard Grimes, Jr., and the State represented by Mr. Stephen King. Defendant acknowledged having been timely served with notice of the probation violation and evidence and testimony was taken on behalf of both parties.

At a previous probation violation hearing, the court ordered the defendant, as a result of the probation violations, to apply for and accept the treatment at the Hazelden Minnesota Alcoholism Treatment Center and then be returned to Miami County Jail for further consideration by the court. Upon further consideration, the court finds that the defendant has not complied with the conditions of probation as originally imposed. Defendant has consistently ignored the advice and orders of the probation officer, has not made himself available on a regular basis and, based upon the report of the Hazelden institution, the court would find that he has not

> complied with the conditions or probation and is not a suitable candidate for continued probation. Accordingly, based upon all of the evidence before the court and careful analysis of all the reports furnished the court, the probation previously granted in this case is hereby revoked and the original sentence is imposed."

Pursuant to the granting of a motion for leave to appeal, the entire case is before this court. The evidence discloses that the victim of the alleged gross sexual imposition was Barbara Cost, who was a brain-damaged twelve-year-old child at the time of the alleged offense. During the month of July, 1981, Barbara Cost resided in the home of Martin Lundgard with her younger brothers and Lundgard's three children.

The arrangement was approved by Barbara's mother, who regarded Lundgard as a friend, but during the period, several neighbors observed abnormal behavior by the defendant toward the child. Among other things, Lundgard was seen kissing her and placing his hands on her breasts and genitals. An investigation by the police revealed that the defendant was in love with the girl and wanted to marry her, and both the girl and Lundgard admitted that they had slept in the same bed and that they would "snuggle" and touch one another.

In this appeal, the appellant has set forth five assignments of error, the first and third of which pose

similar questions as follows:

> "1. The trial court committed error prejudicial to the defendant-appellant when it overruled defendandt's motion for a directed verdict and dismissal, i.e., defendant's criminal rule 29(A) motion for acquittal.
>
> 3. The trial court committed error prejudical to the defendant-appellant when it then found defendant guilty of the charge contained in the indictment."

Each of these alleged errors is directed to the weight and sufficiency of the evidence, and both were waived by the no contest plea because such a plea constitutes an admission of the truth of the facts alleged in the indictment. Crim. R. 11(B)(2). Here, the indictment alleges conduct which is specifically proscribed by R.C. 2907.05(A)(3), and when an indictment

alleges facts sufficient to support a conviction, a trial court's acceptance of a no contest plea requires a finding of guilty. See, State v. Thorpe, 9 Ohio App. 3d 1.

Similarly, the no contest plea, which constitued an admission of the facts alleged against Lundgard, rendered moot any claimed error in the ruling upon the motion for acquittal. But assuming otherwise, the record discloses ample evidence to overcome the motion for acquittal, and a court may not grant an acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether

each material element of a crime has been proved beyond a reasonable doubt. State v. Bridgeman, 55 Ohio St. 2d 261. The appellant's first and third assignments of error are without merit.

The second assignment of error has been stated as follows:

> "2. The trial court committed error prejudicial to the defend-and-appellant and denied him fundamental due process of law when it accepted his no contest plea without substantial compliance with Ohio Criminal Rul 11(C)(2)."

Although it reasonably may be argued that the trial court should adhere scrupulously to the provisions of Crim. R. 11(C)(2) in accepting a no contest plea (State v. Caudill, 48 Ohio St. 2d 342), there must be some

showing of prejudice from any error of omission before the plea may be vacated. See, State v. Stewart, 51 Ohio St. 2d 86; State v. Strawther, 56 Ohio St. 2d 298; State v. Billups, 57 Ohio St. 2d 31.

In the present case, the record discloses substantial compliance with the rule, and sufficient inquiry was made by the trial court as to the voluntariness of the plea, but the transcript fails to show any discussion of the elements of the offense or any reference to the defendant's right to compulsory process.

As to the elements of the charge, it is significant that Lundgard had heard about the nature and elements of the

offense from both the prosecutor and his own attorney in open court before he entered his plea, and he was also present in court during the presentation of the State's case. Under such circumstances, and with emphasis upon the delayed plea in this case, it is inconceivable that the defendant did not understand the nature of the charge, and "it is not always necessary that the trial court advise the defendant of the elements of the crime, or to specifically ask the defendant if he understands the charge, so long as the totality of the circumstances are such that the trial court is warranted in making a determination that the defendant understands the charge". State v. Rainey,

Similarly, where the defendant is represented by counsel who has been designated as process server, there can be no finding of prejudice resulting from the trial court's failure, on the second day of trial, to specifically inform him of his right to compulsory process before accepting a no contest plea. The second assignment of error is overruled.

The fourth assignment of error has been presented by the appellant as follows:

"4. The trial court committed error prejudicial to the defendant-appellant when it sentenced defendant to serve 3-10 years in the Ohio State Penitentiary."

This alleged error is apparently based upon the contention that R.C. 2907.05(A)(3), as applied to Lundgard, makes sexual contact with a person less than thirteen years of age a felony of the third degree whereas R.C. 2907.06 (A)(4) defines sexual contact with a person over twelve but not over fifteen as sexual imposition which is a misdemeanor of the third degree.

According to the record, no objection to the indictment in charging a felony was raised prior to the trial, and no objection to the form

of the charge was made at the time of the no contest plea, and ordinarily, this court will not consider claimed defects which were not called to the attention of the Common Pleas Court. 27 Ohio Jurisprudence 3d 773, Section 1437; State v. Simmans, 21 Ohio St. 2d 258; State v. Glaros, 170 Ohio St. 471. However, in any event, it was within the sound discretion of the prosecuting attorney, and not the accused, to select the charge which might be warranted by the circumstances and by the evidence. United States vs. Batchelder, 442 U.S. 114; Bordenkircher v. Hayes, 434 U.S. 357. The fourth assignment of error is completely without merit.

The fifth and last assignment of error has been framed by the appellant as follows:

> "5. The trial court committed error prejudicial to the defendant-appellant and denied him the minimal requirements of due process of law: (1) in the conduct of his 'probation violation' hearing of February 25, 1983; (2) in its finding contrary to the record, that he had not complied with the conditions of probation; and (3) in its decision revoking his probation and reimposing the original sentence 3-10 years."

According to the entry of the trial court of March 8, 1983, as previously quoted herein, the defendant acknowledged the receipt of notice of the probation hearing of February 25, 1983, and he was afforded an opportunity to present evidence at that hearing. Furthermore, the court made it clear at the

commencement of the proceedings on that date that the hearing was merely a continuation of the previous proceedings conducted on July 21, 1982 (R.1).

After the hearing, the trial court entered its revocation order for a number of violations, including the conduct reflected by the report of the Hazelden Treatment Center, and nothing suggests a denial of due process of law. While the hearing of February 28, 1983 involved some hearsay, the record as a whole does not show an abuse of discretion. If the order was based entirely upon the report from Minnesota, we would be inclined to remand the case to the trial court for further pro-

ceedings, but the action of the court, as shown by its entry, was based in part, at least, upon admitted or undisputed evidence of violations of the terms and conditions of probations. Hence, the fifth assignment of error is overruled.

Finding no prejudicial error in the record, the judgment of the Common Pleas Court will be affirmed.

BROGAN, P.J., KERNS, J., and WOLFF, J., concur.

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

STATE OF OHIO : Case No. 84-CA-67

Plaintiff-Appellee :

vs. : JOURNAL ENTRY

MARTIN A. LUNDGARD :

Defendant-Appellant:

.....

Pursuant to the opinion rendered by this court on September 26, 1985, the judgment of the Common Pleas Court is hereby affirmed.

JAMES A. BROGAN, JUDGE

JOSEPH D. KERNS, JUDGE

WILLIAM H. WOLFF, JR., JUDGE

COURT OF APPEALS
SECOND APPELLATE DISTRICT

Copies mailed to:

Jeffrey M. Welbaum
Prosecuting Attorney
Miami County Prosecutor's Office
Safety Building
Troy, Ohio 45373

Diane M. Kappeler
518-111 West First Street
Dayton, Ohio 45402

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

STATE OF OHIO : CASE NO 84-CA-67

Plaintiff :

vs. :

MARTIN A LUNDGARD :

Defendant :

: : : : : : : : : :

DECISION AND ENTRY

Rendered on the 31st day of

January, 1985

DIANE M. KAPPELER, 518-111 W. First St., Dayton, Ohio 45404
Attorney for the Defendant

JEFFREY M. WELBAUM, Prosecuting Attorney
BY: CHRISTOPHER GEE, Assistant Prosecuting Attorney, Safety Building, 201 West Main Street, Troy, Ohio 45373
Attorney for Plaintiff

PER CURIAM:

This matter is before the court on

motion by petitioner Martin A. Lundgard, defendant in the above captioned case, for leave to appeal after the expiration of the 30 day period for criminal appeals, pursuant to Appellate Rule 5(A). Defendant has cited two appealable orders from which appeal is sought: the sentence entry of the trial court of March 11, 1982, and the entry of March 8, 1983, revoking defendant's probation.

This court hereby sustains the motion for leave to appeal the March 11, 1982 and March 8, 1983 court orders, and grants defendant leave to appeal therefrom. The record on appeal is shall be filed in this court within 40 days from the date of this entry.

COURT OF APPEALS
SECOND APPELLATE DISTRICT

So ordered.

Motion Granted.

_____

JAMES A. BROGAN, Presiding Judge

_____

HERMAN J. WEBER, Judge

Copies maild to:

Diane M. Kappeler
Christopher Gee

IN THE COURT OF COMMON PLEAS
MIAMI COUNTY, OHIO

GENERAL DIVISION

THE STATE OF OHIO	:	CASE NO. 81CR209
PLAINTIFF	:	James J. Hooper, Judge
VERSUS	:	
MARTIN A. LUNDGARD	:	DECISION-JOURNAL ENTRY
DEFENDANT	:	

Hooper, J.

A probation violation hearing was held by this Court on February 28, 1983 with the defendant present and represented by counsel, Mr. Richard Grimes, Jr., and the State represented by Mr. Stephen King. Defendant acknowledged having been timely served with notice of the probation violation and evidence and testimony was taken on behalf of both parties.

At a previous probation violation hearing, the Court ordered the defendant, as a result of the probation violations, to apply for and accept the treatment at the Hazelden Minnesota Alcoholism Treatment Center and then be returned to Miami County Jail for further consideration by the Court. Upon further consideration; the Court finds that the defendant has not complied with the conditions of probation as originally imposed. Defendant has consistently ignored the advice and orders of the probation officer, has not made himself available on a regular basis and, based upon the report of the

Hazelden institution, the Court would find that he has not complied with the conditions of probation and is not a suitable candidate for continued probation. Accordingly, based upon all of the evidence before the Court and careful analysis of all the reports furnished the Court, the probation previously granted in this case is hereby revoked and the original sentence is imposed.

The Sheriff is hereby directed to convey the defendant to the Columbus Intake Center on the 10th day of March, 1983.

It is so ordered.

JAMES J. HOOPER, JUDGE

JJH/jlh

cc: Prosecutor
Richard Grimes
Adult Probation Authority
Miami County Sheriff

IN THE COMMON PLEAS COURT

OF MIAMI COUNTY, OHIO

GENERAL DIVISION

FILED JULY 27, 1982

STATE OF OHIO,	)	CASE NO. 81CR209
PLAINTIFF	)	(Judge James J. Hooper)
VS.	)	
MARTIN A. LUNDGARD,	)	ENTRY CONTINUING AND MODIFYING PROBATION
DEFENDANT	)	(INDICTMENT FOR GROSS SEXUAL IMPOSITION, ORC 2907.05(A)(3)

.....

The Defendant and his attorney, Richard V. Grimes, Jr. appeared in court this 21st day of July 1982 to show cause why probation should not be revoked or the terms and conditions thereof changed. Defendant did admit to the alleged violations of the terms and conditions of his probation and the Court finds that Defendant has violated the terms and conditions of his probation.

Wherefore, it is ordered and adjudged:

(1) That Defendant's probation be continued under the same terms and conditions as previously ordered by the Court.

(2) That Defendant shall be committed to the Miami County Jail for a period of six (6) months.

(3) That if Defendant applies to, and is accepted by, the Hazelden, Minnesota Alcoholism Treatment Center, and that if Defendant agrees to pay all costs of treatment and transportation, that Defendant is to be released to the Hazelden Alcoholism Center until completion of treatment. He is then to be returned to the Miami County Jail for consideration by the Court for release or further consideration.

(4) That Defendant is to pay the costs herein.

(5) That the Clerk shall deliver three (3) copies of this entry to the Adult Probation Authority.

(James J. Hooper signature)

JUDGE

Stephen W. King
Assistant Prosecuting Attorney

Richard V. Grimes, Jr.
Attorney for Defendant

FILED MARCH 11, 1982

IN THE COMMON PLEAS COURT OF MIAMI COUNTY, OHIO

GENERAL DIVISION

STATE OF OHIO,	CASE NO. 81CR209
PLAINTIFF	(Judge James J. Hooper)
VS.	ENTRY
MARTIN A. LUNDGARD,	SENTENCE-SUSPENSION THEREOF AND GRANTING PROBATION
DEFENDANT	(INDICTMENT FOR GROSS SEXUAL IMPOSITION, ORC 2907.05(A)(3)

.....

Defendant, Martin A. Lundgard, was present in open court with his counsel, Richard V. Grimes, on the 4th day of March 1982 for sentencing, having been found guilty by the Court of an indictment for Gross Sexual Imposition, ORC 2907.05(A)(3), on December 29, 1981.

Court reporter ordered. Report of Miami County Adult Probation Authority received and copies were not furnished to either counsel.

The Court inquired of the Defendant's counsel if he desired to speak on behalf of the Defendant. Defendant's counsel did address the Court. The Court then asked the Defendant personally if he wished to make a statment on his own behalf or present any information in mitigation of punishment. The Defendant did address the Court.

Defendant is sentenced to be confined in the Ohio State Penitentiary for a minimum term of three (3) years and a maximum term of ten (10) years,

and is to pay the costs herein. Further, the Court hereby grants judgment against the Defendant and in favor of the County of Miami, State of Ohio, in the amount of $ 178.40 pursuant to Ohio Revised Code Section 2947.23.

It is further ordered that execution of sentence is suspended and Defendant is placed on probation for five (5) years, such probation to be subject to the following conditions:

STANDARD CONDITIONS

1. That he shall refrain from violation of any law, (federal, state and local). He shall get in touch immediately with his probation officer if arrested or questioned by a law enforcement officer.

2. That he shall associate and communicate only with law abiding persons and maintain reasonable hours.

3. That he shall work regularly at a lawful occupation and support his legal dependents, if any, to the best of his ability. When out of work he shall notify his probation officer at once.

4. That he sahll not leave the county or state without permission of the probation officer.

85-1859

Supreme Court, U.S.
FILED
MAY 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1822

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MARTIN A. LUNDGARD, Appellant

V.

STATE OF OHIO, Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

MOTION TO DISMISS

Pursuant to Rule 16(1)(B) of the Rules of the United States Supreme Court, the Appellee, State of Ohio, moves this Honorable Court to dismiss the appeal of Appellant, Martin A. Lundgard in Case No. 85-1822.

Respectfully submitted,

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STATEMENT IN SUPPORT OF MOTION

Appellant, Martin A. Lundgard, bases jurisdiction in this case upon 28 U.S.C. Section 1257(2). 28 U.S.C. Section 1257(2) allows jurisdiction in those cases involving state statutes which are alleged to be repugnant to the United States Constitution. Of the three questions presented by the Appellant, only question one (1) gives rise to an appeal under 28 U.S.C. Section 1257(2). The other questions presented by the Appellant are not directly applicable issues under 28 U.S.C. Section 1257(2), but rather involve issues which could only properly be brought before this Court pursuant to 28 U.S.C. Section 1257(3) upon a writ of certiorari. Thus, dismissal of the appeal would result in dismissal of the

ancillary issues, which were presented pursuant to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029 (1975).

Question one (1) alleges that Section 2907.05(A)(3) and (B) of the Ohio Revised Code violate the Equal Protection Clause of the Fourteenth Amendment because they impose a felony penalty for identical conduct which, under Section 2907.06(A)(4) of the Ohio Revised Code would result in a misdemeanor penalty. Rule 16(1)(b) of the Rules of the United States Supreme Court provides for dismissal of an appeal from a state court when no substantial federal question is presented. The first indication that no substantial federal question has been presented was contained in the entry of the Supreme Court of Ohio in which the

Court stated, "no substantial constitutional question exists therein." (Appellant, Appendix 3a).

Furthermore, this Court has previously held that substantiality does not exist, "where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the Court as to absolutely foreclose further contention on the subject." Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902). See also, Levering & Garrigues Co. v. Morring, 289 U.S. 103 (1933); Goosby v. Osser, 409 U.S. 512 (1973).

Appellee, the State of Ohio, contends that no substantial federal question exists in this case because the question has been settled by previous

decisions of the United States Supreme Court. Specifically, in United States v. Batchelder, 442 U.S. 114, 60 L. Ed.2d 755, 99 S. Ct. 2198 (1979), the Court dealt with a similar situation in which two federal statutes provided different penalties for identical conduct. The Court there stated that such a situation did not violate the Due Process Clause noting, "so long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." Batchelder, supra, at p. 764. Similarly, in addressing the Equal Protection arguments offered, the Court relied on the concept of prosecutorial discretion in stating:

> There is no appreciable difference between the discretion a prosecutor

> exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.

Batchelder, supra at p. 765. See also, Bordenkircher v. Hayes, 434 U.S. 357 (1978). Clearly, these statements in Batchelder supra, demonstrate that the identical issue presented by the Appellant in the case at bar has been previously decided by this Court, and that this Court has taken a position adverse to that of Appellant.

Thus, according to Zucht v. King, 260 U.S. 174 (1922) and Palmer Oil Co. v. Amerada Corp., 343 U.S. 390 (1952), a failure to meet the substantiality standard is cause for dismissal of an appeal.

CONCLUSION

Based on the decision in Equitable, supra, this Court should dismiss an appeal in which the applicable issue has been decided by this Court in a previous case. In light of Batchelder, supra, it is clear that this is the situation that exists in this appeal and thus this court should dismiss the appeal of the Appellant, Martin A. Lundgard.

Respectfully submitted,

James Fredrick Stevenson
Counsel of Record
Counsel for Plaintiff-Appellee

Jeffrey Mitchell Welbaum
Of Counsel
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

James Fredrick Stevenson and Jeffrey Mitchell Welbaum certify that three (3) copies of the foregoing Motion To Dismiss were sent by ordinary U.S. Mail to Diane M. Kappeler, Attorney for Defendant-Appellant, Suite 518, 111 West First Street, Dayton, Ohio 45402-1131 this 27th day of May 1986.

James Fredrick Stevenson
Counsel of Record
Counsel for Plaintiff-Appellee

Jeffrey Mitchell Welbaum
Of Counsel
Counsel for Plaintiff-Appellee

28 USCS - Section 1257

Section 1257 State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a statute or any state of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646, Section 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D. Subpart 2, Section 172(A)(1), 84 Stat. 590).

Rule 16. Motion to Dismiss or Affirm—Reply—Supplemental Briefs

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court of a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

.2. A motion to dismiss or affirm shall comply in all respects with Rules 33 and 42. Forty copies, with proof of service as prescribed by Rule 28, shall be filed with the Clerk. The Clerk shall not accept a motion or brief that does not comply with this Rule and with Rules 33 and 42, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. See Rule 28.1.

.3. A motion to dismiss or affirm shall be as short as possible and may not, either separately or cumulatively, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1(f), and any appendix.

.4. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, will be distributed by the Clerk to the Court for its consideration. However, if a jurisdictional statement on cross-appeal has been docketed under Rule 12.4, distribution of both it and the jurisdictional statement on appeal will be delayed until the filing of a motion to dismiss or affirm by the cross-appellee, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A brief opposing a motion to dismiss or affirm may be filed by any appellant, but distribution of the jurisdictional statement and consideration thereof by this Court will not be delayed pending the filing of any such brief. Such brief shall be as short as possible but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7. After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and

oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.